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# The Enduring Integration School Desegregation Helped to Produce

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THE ENDURING INTEGRATION SCHOOL  
DESEGREGATION HELPED TO  
PRODUCE

Kevin Brown†

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INTRODUCTION

We gather here today at the Fred Gray Symposium. This is in celebration of the life and the influence that he has had on American society. He is one of a handful of lawyers that helped to fundamentally restructure the world we live in. And, speaking as one who was just the second attorney of color to work at a law firm of any significant size in the history of the state of Indiana and as the first professor of color to obtain tenure at my law school, Indiana University Maurer School of Law, I am a personal beneficiary of the world he helped to bring about.

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Thus, it is a rare pleasure that I have the opportunity to pay homage to one of my personal heroes.

I am contributing to this Symposium by discussing one of the major areas that Attorney Gray positively impacted during the Civil Rights Era: school desegregation. On January 28, 1963, he filed suit in the federal district court of Montgomery, Alabama, on behalf of the parents of sixteen school-age children from eight Tuskegee families.<sup>1</sup> At that time, no public school in the state of Alabama had enrolled white and black students together.<sup>2</sup> In order for us to recall what American society was like then we only need to recall that two weeks earlier in Montgomery, George Wallace took the oath of office of Governor. While standing on the gold star that marked the exact spot where almost 102 years earlier Jefferson Davis was sworn in as the provisional president of the Confederate States of America, Wallace delivered his infamous inaugural address where he declared:

It is very appropriate then that from this Cradle of the Confederacy, this very Heart of the Great Anglo-Saxon Southland, that today we sound the drum for freedom as have our generations of forebears before us done, time and again down through history. Let us rise to the call of freedom-loving blood that is in us and send our answer to the tyranny that clanks its chains upon the South. In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny . . . and I say . . . segregation now. . . segregation tomorrow . . . segregation forever.<sup>3</sup>

As is apparent from the inaugural address of George Wallace, a man who received ninety-six percent of the vote in the November, 1962 general election,<sup>4</sup> most Alabama whites were dead set against any form of school desegregation.

But, the school desegregation litigation commenced by Attorney Gray led to a 1967 opinion by a three-judge panel of U.S. District

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1. Brian K. Landsberg, *Enforcing Desegregation: A Case Study of Federal District Court Power and Social Change in Macon Country Alabama*, 48 LAW & SOC'Y REV. 867, 872 (2014).
  2. *Id.* at 873.
  3. Governor George C. Wallace, Inaugural Address at Montgomery, Alabama (Jan. 14, 1963), <http://digital.archives.alabama.gov/cdm/ref/collection/voices/id/2952> [<https://perma.cc/6WBQ-4B7H>].
  4. *AL Governor*, OUR CAMPAIGNS, <http://www.ourcampaigns.com/RaceDetail.html?RaceID=79513> [<https://perma.cc/4WX5-KM4A>] (last visited Apr. 3, 2017).

Judges in the case of *Lee v. Macon County Board of Education*.<sup>5</sup> In what was one of the most important school desegregation cases of the Civil Rights Era, the court ordered the desegregation of all Alabama public schools not already subject to such court decrees.<sup>6</sup> Thus, Attorney Gray helped desegregate more than 100 local school systems.

My charge in this discussion was to address the significant impact of Fred Gray's career regarding school desegregation. I could talk about the case of *Lee v. Macon County Board of Education*<sup>7</sup> or about the impact of school desegregation litigation on the integration of public schools in Alabama, the South, or throughout the country.<sup>8</sup> But, whether national, regional, or local, the school desegregation story is a familiar one. It is a story of the rise and fall of school desegregation. There was a period of increasing school desegregation from the early-1960s to the mid-1970s, brought about by major Congressional legislation such as the Civil Rights Act of 1964 and the Elementary and Secondary Education Act of 1965 and by federal court decisions in cases like *Lee v. Macon County*, *Green v. County School Board of New Kent County*,<sup>9</sup> *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>10</sup> and *Wright v. Council of Emporia*.<sup>11</sup> However, by the end of his first term, President Richard Nixon had appointed four justices to the Supreme Court.<sup>12</sup> These Nixon appointees made up four of the five-justice majority in the Court's 1974 decision in *Milliken v. Bradley*.<sup>13</sup> In *Milliken*, the Supreme Court limited the scope of school desegregation decrees to the offending school district's boundaries, absent very unusual circumstances.<sup>14</sup> The negative impact of *Milliken* on school desegregation was

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5. 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd sub nom.*, Wallace v. United States, 389 U.S. 215 (1967).
  6. *Id.* at 480, 482 83.
  7. *See, e.g.*, Landsberg, *supra* note 1, at 867 (exploring how *Lee v. Macon County* became "the vehicle for statewide school desegregation").
  8. KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA: FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION 6 7 (2005).
  9. 391 U.S. 430 (1968).
  10. 402 U.S. 1 (1971).
  11. 407 U.S. 451 (1972).
  12. *See* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 9, 13, 227, 236 (1999) (noting that Nixon appointed Warren Burger on June 9, 1969, Harry Blackmun on May 12, 1970, Lewis Powell on December 6, 1971, and William Rehnquist on December 10, 1971).
  13. 418 U.S. 717, 720 (1974).
  14. *Id.* at 752 53.

two-fold. It provided a simple exit from the scope of school desegregation remedies for white families who did not want their children to participate in such a process. These families simply had to move from a district under a school desegregation order to an adjacent one that was not. As a result, it helped to generate, if not condone, the white flight that frustrated a host of desegregation efforts throughout the country. Secondly, this limit on the scope of desegregation remedies meant that in many urban school districts, effective desegregation was not possible because there were not enough white students in the district to accomplish it.<sup>15</sup> As a result, *Milliken* eliminated any real likelihood that court-ordered school desegregation would effectively provide education in majority white schools for the bulk of black school children.<sup>16</sup> Thus, what followed the time of the growth of school desegregation was a period of stagnation from the mid-1970s to the late-1980s. As the story of the unfolding history of school desegregation progressed towards its ultimate conclusion, we come to the Court's school desegregation termination decisions in the early 1990s, *Board of Education of Oklahoma City v. Dowell*,<sup>17</sup> *Freeman v. Pitts*,<sup>18</sup> and *Missouri v. Jenkins*.<sup>19</sup> With these decisions, federal courts throughout the country began to dissolve school desegregation decrees, which led, predictably, to the rise of resegregation in the early 1990s.<sup>20</sup>

The Court's school desegregation termination decisions also marked the beginning of the withdrawal of the federal courts' engagement with school desegregation. But, the abandonment of school desegregation left the issue to the political process. However, the Court's next major school desegregation opinion occurred a dozen years after its last termination decision. In *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>21</sup> the Supreme Court delivered its final blow to school desegregation efforts by the political process. The Supreme Court struck down voluntary school desegregation plans adopted by the school districts in Seattle, Washington, and Jefferson County, Kentucky, as

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15. See Robert A. Sedler, *The Profound Impact of Milliken v. Bradley*, 33 WAYNE L. REV. 1693, 1694 (1987) ("The substantive right that has emerged [from *Milliken*] is not a right to attend a racially integrated school, but only a right to attend school in a school system in which there are no vestiges of the de jure segregation.").

16. *Id.*

17. 498 U.S. 237 (1991).

18. 503 U.S. 467 (1992).

19. 515 U.S. 70 (1995).

20. For an in-depth discussion of this effect, see Sean F. Reardon et al., *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL'Y ANALYSIS & MGMT. 876 (2012).

21. 551 U.S. 701 (2007).

violations of the equal protection clause.<sup>22</sup> In so doing, the Court ruled unconstitutional the very kind of school desegregation plans that it had required school districts implement in order to remedy their operation of a dual school system.

We can see the effect of these major events impacting school desegregation reflected in the historical percentages of black students attending majority white schools and hyper-segregated schools—schools in which ninety percent or more of students are underrepresented minorities. In 1968, 23.4% of black students attended majority-white schools nationwide; by 1972, this had increased to 36.4%, and it would reach its all-time high of 37.1% in 1980.<sup>23</sup> Also in the 1968–69 school year, 64.3% of black students nationwide went to hyper-segregated schools; four years later, that percentage had decreased to 38.7%, and it reached its all-time low of 32.5% in 1986.<sup>24</sup> Desegregation was even more rapid and pronounced in the South. When Attorney Gray filed the complaint in *Lee v. Macon County*, 99% of black public school children attended totally segregated schools.<sup>25</sup> In 1967, only 13.9% of black students attended majority-white schools; but by 1972, that figure had jumped to 36.4%, and it “reach[ed] its zenith of 43.5% in 1988.”<sup>26</sup> Also, the percentage of southern blacks in hyper segregated schools decreased from 77.8% in 1968 to 23% in 1980.<sup>27</sup> By the early 1990s, however, we had “already seen the maximum amount of racial mixing in public schools that will exist in our lifetime.”<sup>28</sup> For the country as a whole, the percentage of blacks in hyper-segregated schools has steadily increased from 32% in 1988 to “[o]ver a third (37.4%)” in

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22. *Id.* at 710–11, 716.

23. See GARY ORFIELD ET AL., THE CIVIL RIGHTS PROJECT, *BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE* 10 (2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf> [<https://perma.cc/DA2S-NGC3>] (citing U.S. Department of Education data on the percentage of black students in majority white schools from 1954–2011).

24. *BROWN*, *supra* note 8, at 177, 206.

25. ORFIELD ET AL., *supra* note 23, at 4.

26. *BROWN*, *supra* note 8, at 177.

27. GARY ORFIELD, PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES: 1968–1980, at 4 (1983), [https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/public-school-desegregation-in-the-united-states-1968-1980/orfield\\_american-desegregation-1983.pdf](https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/public-school-desegregation-in-the-united-states-1968-1980/orfield_american-desegregation-1983.pdf) [<https://perma.cc/SBW3-SYFD>].

28. James S. Kunen, *The End of Integration*, TIME (Jun. 24, 2001) (quoting Kevin Brown, Professor at Indiana University School of Law Bloomington), <http://content.time.com/time/magazine/article/0,9171,135835,00.html> [<https://perma.cc/9FY3-259Z>].

2000.<sup>29</sup> Over the past fifteen years we have seen more and more school desegregation decrees terminated. In the South, by 2000, the percentage of blacks attending majority white schools dropped to 31% and in 2011 it was down to 23.2%.<sup>30</sup>

The school desegregation in Alabama followed the southern trend. From 1968 to 1980, the percentage of blacks attending majority white schools increased from 8.3% to 44.3% and the percentage enrolled in hyper-segregated schools dropped to 31.9 in 1980.<sup>31</sup> However, by 2001, the percentage of blacks attending majority white schools in Alabama had decreased to 29.6% with the percentage attending hyper-segregated schools increasing to 43%.<sup>32</sup> The percentage of blacks in hyper-segregated schools remained about the same—almost 42%—in 2011.<sup>33</sup>

The tawdry history of school desegregation is a progression from the Supreme Court creating it, then nurturing it, then constraining its scope, then limiting its own and that of the federal courts participation in its continuation, to finally virtually stomping it out of existence. Because, as the Supreme Court giveth, so it taketh away. Thus, however it is told, as a national story, a regional story, or a local story, the story about the history of school desegregation is, therefore, a story mainly about its rise and fall. In the end, avid supporters of school desegregation, like myself, are left lamenting the fact that not more was done. We are troubled to see so little lasting school desegregation delivered at such great costs in economic, emotional, psychological, and legal terms. Supporters of school desegregation walk around with our pride eternally wounded, our heads permanently bowed, and under our breaths we constantly curse Supreme Court opinions like *Milliken v. Bradley*, *Board of Education v. Dowell*, and *Parents Involved*.

As this is a symposium to celebrate the impact of the legal work of Fred Gray, I want to concede the negative with regard to school desegregation, in order to concentrate on the positive. So rather than tell the depressing tale of the rise and fall of school desegregation, I want to return to the historical crossroads of the 1950s and 1960s with the aim of identifying and marking out the great success that proponents of school desegregation helped to bring about on an underappreciated parallel road. The American of today realizes that segregation was not

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29. ERICA FRANKENBERG ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 31 (2003), <https://escholarship.org/uc/item/3rh7w18g#page-1> [<https://perma.cc/P6UM-G8HL>].

30. ORFIELD ET AL., *supra* note 23, at 10.

31. ORFIELD, *supra* note 27, at 6, 51.

32. FRANKENBERG ET AL., *supra* note 29, at 50.

33. ORFIELD ET AL., *supra* note 23, at 20.

only oppressive, but contrary to the fundamental values of individualism and self-determination. So, we condemn that time period in American history, for the most part, because of this obvious moral evil. But, our modern discussions of segregation have disconnected this institution from the primary rationales that drove it—the prevention of interracial sexual relations between blacks and whites and the production of mixed-race offspring.<sup>34</sup> Shortly after the Civil War, the Supreme Court of Pennsylvania put it succinctly in an opinion upholding a company rule that required segregation on railroad cars, “[f]rom social amalgamation it is but a step to illicit intercourse, and but another to intermarriage.”<sup>35</sup> Even though American society had long permitted interracial sexual relations within the institution of slavery, it was the concerns about the dangers of interracial sexual relations that provided the motives for and rationales that justified segregation.

Proponents of school desegregation did not center their advocacy on the fact that school desegregation would lead to increased interracial sexual relations between blacks and whites. Indeed, as one contemporary commentator on interracial marriage and the law put it, “desegregation on the marriage front seemed far less pressing a matter than did progress in educational opportunity or voting rights.”<sup>36</sup> But, many advocates for school desegregation embraced the teachings about human interactions espoused by Gordon Allport in his seminal work, *The Nature of Prejudice*.<sup>37</sup> Allport developed the intergroup contact theory that supported the concept of school desegregation. This theory asserted that the way to break down racial stereotypes and provide for the ability of people to see others of different races as individuals was to promote high-quality interracial interactions.<sup>38</sup> In these interactions, people can get to learn about individuals from different social groups and alter their affective, cognitive, and behavioral responses to outgroups and their members.<sup>39</sup> Allport asserted that these interracial contacts were “maximally effective” when they occurred in situations that “lead to a sense of equality in social status.”<sup>40</sup> It is also best if they occur in ordinary purposeful pursuits with, if possible, the positive sanction of the entire community. The deeper and more authentic these

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34. See *infra* Part I.

35. *W. Chester & Phila. R.R. Co. v. Miles*, 55 Pa. 209, 213 (1867).

36. PETER WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW* AN AMERICAN HISTORY 184 (2002).

37. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954).

38. *Id.* at 261–81.

39. *Id.* at 280–81.

40. *Id.* at 489.



interracial contacts, the greater their effect.<sup>41</sup> Thus, despite the lack of explicit advocacy by proponents of school desegregation at the time that it would lead to increased interracial sexual relations, in retrospect, this seems an obvious byproduct. And such an increase would go a long way in undercutting one of the primary rationales that justified school segregation in the first place.

Looking back on the impact of the legal career of Attorney Fred Gray, one of the most stunning developments in American society since he filed the lawsuit in *Lee v. Macon County* is the public acceptance of interracial sexual relations. For example, in 1958, only four percent of whites approved of interracial marriage between blacks and whites.<sup>42</sup> However, acceptance of interracial sexual relations has skyrocketed since then. This is especially true among the young, those of child-bearing age. According to a 2010 Pew Research Center Report, almost all Millennials (18 to 29 year olds) accept interracial dating and marriage.<sup>43</sup> The Report notes that ninety-two percent of Millennials say that they would be fine with a family member marrying someone outside of their group if that person were white, and eighty-eight percent if that person were black.<sup>44</sup> The increase in the acceptance of interracial sexual relations has led to substantial increases in these kinds of relations and the numbers of Black Multiracials.<sup>45</sup> For example, according to a 2015 Pew Research Center Report, nineteen percent of blacks who married in 2013 married a person of a different race, including one in four black men.<sup>46</sup> In addition, according to the 2010 census, 7.4% of blacks<sup>47</sup>—up from 4.8% in 2000<sup>48</sup>—indicated another racial category,

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41. *Id.*

42. See KIM M. WILLIAMS, MARK ONE OR MORE: CIVIL RIGHTS IN MULTIRACIAL AMERICA 89 (1st paperback ed. 2008) (citing the 1958 Gallop Poll “Do You Approve or Disapprove of Marriage Between Blacks and Whites” wherein only whites participated).

43. *Almost All Millennials Accept Interracial Dating and Marriage*, PEW RES. CTR. (Feb. 1, 2010), <http://pewresearch.org/pubs/1480/millennials-accept-interracial-dating-marriage-friends-different-race-generations> [https://perma.cc/6RVY-LZPP].

44. *Id.*

45. I use the term “Black Multiracial” to designate mixed-race people with some black ancestry. When the “one-drop” rule determined who was black, these individuals would have been considered “black.”

46. Wendy Wang, *Interracial Marriage: Who Is ‘Marrying Out’?*, PEW RES. CTR. (June 12, 2015), <http://www.pewresearch.org/fact-tank/2015/06/12/interracial-marriage-who-is-marrying-out/> [https://perma.cc/WAN8-WHGV].

47. KEVIN D. BROWN, BECAUSE OF OUR SUCCESS: THE CHANGING RACIAL AND ETHNIC ANCESTRY OF BLACKS ON AFFIRMATIVE ACTION 150 (2014).

48. *Id.*

over two-and-a-half times the 2.9% of the American population as a whole.<sup>49</sup> As one might expect, younger blacks are more likely to be multiracial. Census figures from 2012 show that the portion of Black Multiracials among the black population between the ages of twenty and twenty-four was only 7.9%.<sup>50</sup> However, this percentage increased for those between the ages of fifteen and nineteen to 8.9%, between ten and fourteen years it increased to 10.9%, between five and nine years to 15.0%, and for those under the age of five it was 19.1%.<sup>51</sup> Thus, at this time, almost one in five black children under the age of ten is probably mixed race.

In this Article, I will review the historical objections to interracial sexual relations involving blacks and whites in order to point out how much those attitudes changed while American society experienced the rise and fall of school desegregation. I am not asserting that school desegregation, alone, caused these changes in attitudes. Rather, what I am pointing out is that given the historic rationales that justified segregation, if we take our desires to integrate our public schools to their logical conclusions, among the most significant factors that should be examined to determine its ultimate impact are the increases in interracial sexual relations and multiracial children. After all, are these not the best markers of true racial integration?

Prior to the European Voyages of Discovery, England had little contact with sub-Saharan Africans. As a result, the English colonists (and later Americans) had to work out the relationships between blacks and whites as they inhabited North America. Part I discusses the original objections to interracial sexual relationships and mixed-race children that were propounded during the colonial and antebellum periods. Those rationales were used to support a race-based system of slavery. But, they did not always constrain what slave owners did with their property. With the end of the Civil War and abolition of slavery, the justifications of black inferiority to maintain a race-based system of slavery were obsolete. As a result, the racial lines that existed between blacks and whites were called into question. The Civil Rights Act of 1866, which granted blacks the same rights to enter into and enforce contracts as whites, and the Fourteenth Amendment cast doubt on the continuing legitimacy of anti-miscegenation statutes.<sup>52</sup> However, new “scientific evidence” produced during the Civil War “proved” that the products of black-white sexual unions were inferior to both full-blooded blacks and whites.<sup>53</sup> Furthermore, this inferiority might worsen with subsequent generations. Thus, interracial sexual unions could lead to

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49. *Id.*

50. *Id.*

51. *Id.*

52. *See infra* Part II.A.

53. *See infra* Part II.B.

growing social problems for generations to come. This evidence provided strong justifications for the prevention of interracial sexual relations and mixed-race offspring. Part II will discuss anti-miscegenation after the Civil War and abolition. It first addresses how anti-miscegenation statutes survived legal challenges. It then discusses the new scientific evidence generated during the Civil War that confirmed popularly held opinions regarding the dangers of interracial sexual relations. These dangers also helped to motivate the embrace of the “one-drop rule” (any percentage of black blood made a person black) to determine who was black.<sup>54</sup> Deeply held objections to interracial sexual relations and mixed-race children continued up to the commencement of school desegregation in the 1950s. Since that time, however, American society’s acceptance of interracial dating and marriage has increased significantly. This greater acceptance has led to substantial increases in the numbers of blacks involved in interracial sexual relationships and Black Multiracials. Part III will discuss these changes. While American society may not have successfully been able to maintain desegregated schools, we have undercut the long-standing rationales for segregation.

## I. OBJECTIONS TO INTERRACIAL SEXUAL RELATIONSHIPS DURING THE COLONIAL AND ANTEBELLUM PERIODS

Economic motivations played a significant part in the selection of blacks as the labor force used to develop and cultivate the New World and their subsequent continued subjugation under segregation after the Civil War.<sup>55</sup> But economic motivations alone can never suffice to explain institutions like slavery and segregation. People are motivated by more than material needs and desires. To rest the justifications for such exploitation on economic motives alone requires ignoring the emotional, psychological, and spiritual dimensions of human nature. Throughout history, religious, scientific, and cultural justifications were propounded to justify not only confining blacks to inferior status, but also to warn against interracial sexual relationships.

### *A. Religious Prohibitions on Interracial Sexual Relations During the Colonial Period*

The English in northern Europe had little contact with Africans before the European Voyages of Discovery. As Carter G. Woodson described it, there was extensive miscegenation in the English colonies before the master race realized the apparent need for maintaining its

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54. See *infra* Part II.C.

55. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 3 29 (3d ed. 1974) (emphasizing that whites feared that the economy would surely collapse without the labor of former slaves).

racial integrity.<sup>56</sup> During the colonial period, however, the English fashioned a race-based system of slavery. Interracial unions created a problem for such a system because they blurred the boundary lines between slave and free and raised questions about the justifications for slavery.<sup>57</sup>

Religious justifications about the differences of the races existed before the English founded Jamestown in 1607.<sup>58</sup> The English had to work out the application of those religious rationales in the process of colonizing North America. These beliefs about the distinctness of the races provided a framework in British North America to justify not only slavery, but also prohibitions against miscegenation, especially outside the institution of slavery.<sup>59</sup> Many religious adherents viewed the separate races as the product of God's creation or design. Religious proponents of black inferiority normally pointed to two stories from the Bible to establish the notion that blacks were a cursed group of people.<sup>60</sup> According to Genesis 9:21–27, Noah became drunk one day and was lying naked on the ground in his tent. He was discovered by his son, Ham, who saw his father's nakedness. Ham told his brothers, Shem and Japheth, about this. The other two brothers took a garment, laid it upon their shoulders, walked backwards, and covered their father. Unlike Ham, they never saw Noah's nakedness. When Noah awoke and discovered what had occurred, he blessed Shem and Japheth, but cursed the descendants of Ham to be servants to Shem and Japheth. Before the Fifteenth Century, both Christians and Muslims believed that the descendants of Ham had turned black. In a society where the foundations of scientific reasoning were derived from the Bible, the notion of Ham's descendants being black became an accepted aspect of civil society.<sup>61</sup>

A second story from Genesis was also used to prove that blacks were a cursed people. This was the story of the murder of Abel by his

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56. Carter G. Woodson, *The Beginnings of the Miscegenation of the Whites and Blacks*, 3 J. NEGRO HIST. 335, 339 (1918), reprinted in *INTERRACIALISM: BLACK-WHITE INTERMARRIAGE IN AMERICAN HISTORY, LITERATURE, AND LAW* 42, 44 (Werner Sollors ed. 2000) (ebook).

57. *Id.* at 339–50.

58. See DAVID M. GOLDENBERG, *THE CURSE OF HAM: RACE AND SLAVERY IN EARLY JUDAISM, CHRISTIANITY, AND ISLAM* 1 (2003) (describing a biblical story as justifying slavery for “more than a thousand years”).

59. *Id.* at 3.

60. See *infra* notes 61–65 and accompanying text.

61. The primary religious justification for enslaving blacks, and blacks alone, was derived from the curse Noah placed on the descendants of Ham. GOLDENBERG, *supra* note 58, at 1.

brother Cain.<sup>62</sup> Cain was a tiller of the soil and Abel was a keeper of sheep. Both brothers made sacrifices to God: Cain offered the fruit of the ground, Abel offered a young sheep. However, God did not respect Cain's offer of a sacrifice, but did respect that of Abel. Angered by God's rejection, Cain slew his brother. In punishment, God placed a mark on Cain.<sup>63</sup> As earlier Christian groups before them, some Christian groups in the United States, including the Southern Baptists, believed that the mark God placed on Cain was black skin.<sup>64</sup> But the Cain story did not include the curse of enslaving blacks. Thus, these religious groups also asserted that a descendant of Cain married a descendant of Ham. Black people were, therefore, the descendants of the merging of these two cursed bloodlines. As a result, black people took their color from the mark of Cain and the curse of slavery by being the descendants of Ham.<sup>65</sup>

Beyond the belief that blacks were cursed by God, the story of the Tower of Babel in Genesis Chapter Eleven was also used as justification for the notion that God opposed the amalgamation of the races.<sup>66</sup> As the story of the Tower of Babel goes, a unified humanity that spoke the same language decided to build a great city with a temple tower reaching into the sky. They intended that the tower would be an eternal monument to their achievements. When God came down to see the city and the tower he was displeased. He decided to end the building of the tower, scatter humans all over the earth, and give them many different languages.<sup>67</sup> Many Christian adherents viewed this story as demonstrating God's abhorrence to the amalgamation of people.<sup>68</sup> It also explained why blacks were on one continent, whites another, and Native Americans on a third.

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62. See *Genesis* 4:1 16.

63. *Id.*

64. KARL W. GIBERSON, *SAVING THE ORIGINAL SINNER: HOW CHRISTIANS HAVE USED THE BIBLE'S FIRST MAN TO OPPRESS, INSPIRE, AND MAKE SENSE OF THE WORLD* 141 (2015).

65. See, e.g., GOLDENBERG, *supra* note 61, at 178 81 (2003) (explaining that Cain was supposedly cursed with dark skin for killing his brother and that the idea of slavery came in to play when the theory took hold that Ham married a descendant of Cain).

66. See JOSIAH PRIEST, *BIBLE DEFENCE OF SLAVERY AND ORIGIN FORTUNES, AND HISTORY OF THE NEGRO RACE* 203 50 (1852) (using the story of the Tower of Babel to argue that God is against amalgamation of races).

67. *Genesis* 11:1 9.

68. PRIEST, *supra* note 66, at 203 50.

*B. Legal Prohibitions Against Interracial Sexual Unions During the Colonial Era*

Legal prohibitions on interracial mating and intimate sexual relations were among the longest running statutes in American history. However, these prohibitions did not normally constrain the ability of slaveholders to engage in interracial sexual relationships with their property.

The Virginia House of Burgesses adopted the first statute prohibiting miscegenation in 1662.<sup>69</sup> This Virginia law sought to discourage miscegenation, declaring that the act was twice as evil when committed between a black person and a white person.<sup>70</sup> One year earlier, Maryland had passed a statute to discourage miscegenation, which enslaved white women who married black slaves, as well as their children.<sup>71</sup> Later versions of the Virginia law left no doubt about its purposes. In 1691, Virginia adopted a statute that banished from the colony any free English or other white man or woman who married a Negro, mulatto, or Indian man or woman, bound or free.<sup>72</sup> The preamble to the law made the rationale for the statute clear: “for the prevention of that abominable mixture and spurious issue which hereafter may increase in this dominion.”<sup>73</sup> The purpose of the statute left no doubt that Virginians were motivated by a desire to suppress the numbers of Black Multiracials. Over the years, Virginia increased the punishments for anyone complicit in the crime of intermarriage.<sup>74</sup> North Carolina, which Virginia colonists began to settle into in the 1650s, banned interracial marriage in 1715.<sup>75</sup>

Northern colonies also banned miscegenation. In 1705, Massachusetts adopted an anti-miscegenation law.<sup>76</sup> The following year, New York adopted such a statute. In 1725–1726, Pennsylvania banned all interracial marriages, punished whites who engaged in the practice, and

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69. F. JAMES DAVIS, *WHO IS BLACK?: ONE NATION’S DEFINITION* 33 (2d prtg. 2002).

70. *Id.*

71. See Laurence C. Nolan, *The Meaning of Loving: Marriage, Due Process and Equal Protection (1967 1990) as Equality and Marriage, from Loving to Zablocki*, 41 *How. L.J.* 245, 247–48 (1998).

72. Act XVI, 3 *Laws of Va.* 86–87 (Hening 1823).

73. Woodson, *supra* note 56, at 342–43.

74. FRANK W. SWEET, *LEGAL HISTORY OF THE COLOR LINE: THE RISE AND TRIUMPH OF THE ONE-DROP RULE* 125 (2005).

75. *Id.* at 128.

76. William D. Zabel, *Interracial Marriage and the Law*, *ATLANTIC MONTHLY*, Oct. 1965, at 76.

decreed that the mulatto children of white women became servants until the age of thirty-one.<sup>77</sup> By the signing of the Declaration of Independence, twelve of the thirteen colonies had banned interracial marriage.<sup>78</sup>

*C. Scientific Objections to Interracial Sexual Relations Before the Civil War*

As the Nineteenth Century progressed, American society increasingly justified its prohibitions on interracial sexual unions with the resort to scientific rationales.<sup>79</sup> But, it took some time for these rationales about the dangers of miscegenation to become widely accepted. Up until the 1840s, the dominant scientific view about the origin of the different races was rooted in Biblical beliefs. According to the Book of Genesis, all humans descended from Adam and Eve.<sup>80</sup> Thus, the observable differences that existed between the races in terms of color, physical appearance, and personality characteristics, including intelligence, were the result of environmental factors as groups adapted to their geographic locations over the generations.

As these monogenesists argued, though blacks may differ physically and mentally from whites, they were of the same species. One of the strongest rationales for the races being the same species came from the fact that their offspring could reproduce. When different species of animals produce a hybrid, by art or accident, scientists of the day believed these hybrids were sterile and, thus, hybrids die off in a very short period of time.<sup>81</sup> As a result, the only explanation for the creation of the various species of animals is an act of Divine Power alone. Since interracial sexual relations between whites and blacks can produce fertile progeny, the races must be of the same species.<sup>82</sup>

As I have written about in other writings,<sup>83</sup> the traditional monogenesis scientific view came under challenge in the 1840s. This new school of thought argued that humankind originated as the result of different acts of creation in several different places in the world.<sup>84</sup> These

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77. JOEL WILLIAMSON, *NEW PEOPLE: MISCEGENATION AND MULATTOS IN THE UNITED STATES* 11 (1980).

78. SWEET, *supra* note 74, at 128.

79. Zabel, *supra* note 76, at 78-79.

80. Genesis 2.

81. JOHN BACHMAN, *THE DOCTRINE OF THE UNITY OF THE HUMAN RACE EXAMINED ON THE PRINCIPLES OF SCIENCE* 119 (Charleston, C. Canning, 1850), *portions reprinted in* 1 *RACIAL THOUGHT IN AMERICA FROM THE PURITANS TO ABRAHAM LINCOLN: A DOCUMENTARY HISTORY* 449 (Louis Ruchames ed., 1969).

82. *Id.*

83. BROWN, *supra* note 47, at 156-184.

84. *Id.* at 166-67.

polygenesists contradicted the dominant scientific beliefs of the day about the races. They argued that the different races were different species altogether, not just different varieties.<sup>85</sup> One of the leading early polygenesis theorists responded to the argument that this theory contradicted the account of creation in by Bible by saying that the Book of Genesis spoke only of the creation of the Caucasian race.<sup>86</sup>

Josiah C. Nott, a Southern surgeon from Mobile, Alabama deserves special notice. He published a short piece in 1843 in the prestigious *Boston Medical and Surgical Journal* that challenged two of the dominant notions regarding racial differences of the day.<sup>87</sup> He asserted that the Black Multiracial was a hybrid, i.e., the offspring of two distinct species like a mule from a horse and a donkey.<sup>88</sup> Refuting the notion that hybrids of two different species would not be capable of reproducing, Nott asserted that the mulatto would simply be less fertile and inferior to full-blooded blacks.<sup>89</sup> He went on to stress that Black Multiracials had shorter life expectancies than either blacks or whites; such mixed-race women were feebler and subject to many chronic female diseases; they were also bad breeders because many of them would not conceive at all; and a large portion of the children from those that did conceive would die at an early age.<sup>90</sup> Worse still, Nott concluded that each successive generation of mixed-race people would become progressively more degenerate.<sup>91</sup> Thus, the problem of inferior progeny created by interracial breeding would grow as the generations passed.

The 1850 census included, for the first time, a “mulatto” category for mixed-race blacks/whites and blacks/Native Americans.<sup>92</sup> Congressional testimony revealed that one of the motivations for the addition

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85. See JOSIAH CLARK NOTT ET AL., TYPES OF MANKIND: OR, ETHNOLOGICAL RESEARCHES, BASED UPON THE ANCIENT MONUMENTS, PAINTINGS, SCULPTURES, AND CRANIA OF RACES, AND UPON THEIR NATURAL, GEOGRAPHICAL, PHILOLOGICAL AND BIBLICAL HISTORY 80 (Philadelphia, J.B. Lippincott & Co. 1868).

86. BROWN, *supra* note 8, at 67.

87. J. C. Nott, The Mulatto a Hybrid Probable Extermination of the Two Races If the Whites and Blacks Are Allowed to Intermarry, 29 BOSTON MED. & SURGICAL J. 29 (1843).

88. *Id.* at 30.

89. *Id.* at 30 31. Nancy Krieger, *Shades of Difference: Theoretical Underpinnings of the Medical Controversy on Black/White Differences in the United States, 1830 1870*, 17 INT’L J. HEALTH SERVS. 265 (1987).

90. Nott rested his conclusions in part on an 1842 article, also published in the *Boston Medical and Surgical Journal* by an author who only identified himself as “Philanthropist.” Nott, *supra* note 87, at 29 30.

91. *Id.* at 31.

92. C. Matthew Snipp, *Racial Measurement in the American Census: Past Practices and Implications for the Future*, 29 ANN. REV. SOC. 563, 566 (2003).



of a mulatto race category and other questions about race was to provide scientists and supportive legislators with the ability to gather information on the condition of mixed-race blacks.<sup>93</sup> With the exception of the year 1900, a mulatto category was included among the questions about race or color on the census form from 1850 through 1920.<sup>94</sup>

## II. ANTI-MISCEGENATION AFTER THE CIVIL WAR AND ABOLITION

With the end of the Civil War and the abolition of slavery, the nation adopted three Constitutional Amendments and five major civil rights bills.<sup>95</sup> As a result, federal law called into question the previous rights and duties attached to race. Added to this was the fact that African-Americans had fought valiantly for the Union during the Civil War. President Lincoln often emphasized the significance of the black soldiers to Union's war effort. Lincoln candidly noted that without the

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93. MELISSA NOBLES, *SHADES OF CITIZENSHIP: RACE AND THE CENSUS IN MODERN POLITICS* 38 42 (2000).
94. *See History*, U.S. CENSUS BUREAU, [http://www.census.gov/history/www/through\\_the\\_decades/index\\_of\\_questions/1900\\_1.html](http://www.census.gov/history/www/through_the_decades/index_of_questions/1900_1.html) [<https://perma.cc/T6BH-DJ3P>] (last visited March 5, 2017) (providing an archive of U.S. Census Bureau questionnaires since 1790). In 1890, the census actually subdivided the categories of mixed-race blacks to include one for mulattoes, quadroons, and octoroons. NAT'L RESEARCH COUNCIL, *MODERNIZING THE U.S. CENSUS* 144 (B. Edmonston & C. Schultze eds., 1995).
95. U.S. CONST. amends. XIII, XIV, XV. Congress also passed five major civil rights measures. The Civil Rights Act of 1866, 14 Stat. 27 (declaring blacks citizens, granting blacks equal rights to enter into contracts, and allowing blacks to buy, sell, lease, or rent property, to sue and be sued in court, and to give testimony in court); the Enforcement Act of 1870, 16 Stat. 140 (outlawing state actions intended to deprive blacks of the right to vote); the Enforcement Act of February 28, 1871, 16 Stat. 443 (amending the Enforcement Act of 1870 and intending to eliminate fraudulent registration practices, as well as establishing a complex system of federal machinery to supervise elections in the states if the circuit court was petitioned); the Enforcement Act of April 20, 1871, 17 Stat. 13 (intending primarily to prevent the intimidation of blacks by illegal action where states were unwilling or unable to provide such protection, giving the president the right to employ the militia, and allowing the suspension of the right of habeas corpus when public safety was endangered by unlawful combinations); the Civil Rights Act of 1875, 18 Stat. 335 (guaranteeing to all persons, regardless of race or color, the full and equal enjoyment of inns, public conveyances, and public places of enjoyment, as well as granting the right to sue for personal damages, giving federal courts exclusive jurisdiction over cases arising under the act, and making it a misdemeanor to bar any qualified person from serving as a grand or petit juror).

black troops, no Administration could save the Union.<sup>96</sup> The South, where ninety-one percent of blacks resided,<sup>97</sup> faced a racial crisis.

Even though blacks sacrificed much in defense of the Union, white objections to their full equality and miscegenation remained strong. Some southern whites even went so far as to assert that the Confederacy's defeat on the battlefield represented God's punishment for miscegenation.<sup>98</sup> As southerners reconstituted their governments in the summer and the fall of 1865, the first order of legislative business was to address what to do about the freed blacks. Southern state legislatures passed a series of measures to control the freedmen that became known as the "Black Codes."<sup>99</sup> Among these provisions were statutes outlawing interracial sexual unions. South Carolina, which had resisted anti-miscegenation legislation before abolition, passed its first such statute in 1865.<sup>100</sup> Alabama's Constitution included a provision that voided interracial unions.<sup>101</sup> Mississippi went so far as to prescribe a life sentence in the state penitentiary for those who violated its anti-miscegenation statute.<sup>102</sup>

Even whites who did not champion the cause of slavery or black inferiority still believed that God disdained miscegenation. *West Chester & Philadelphia Railroad Co. v. Miles*,<sup>103</sup> a decision handed down by the Pennsylvania Supreme Court shortly after the end of the Civil War, made this less demeaning rationale clear. In upholding the right of a train conductor acting pursuant to a company rule to require a black female passenger to sit in an area of the carriage for blacks that in all respects was as comfortable, safe, and convenient as the area for whites, the Court wrote:

Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts

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96. See Letter from Abraham Lincoln to Charles D. Robinson (Aug. 17, 1864), in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1863 1864 at 499, 499 501 (Roy P. Basler ed. 1953) (discussing his motivations for the emancipation proclamation).

97. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1790 1978, at 13 (1979).

98. DAVIS, *supra* note 69, at 43.

99. NOBLES, *supra* note 93, at 48.

100. Act of Dec. 19, 1865, 1866 S.C. Acts 270 (outlawing interracial marriage).

101. ALA. CONST. art. IV, § 102.

102. NOBLES, *supra* note 93, at 48.

103. 55 Pa. 209 (1867).

and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not to declare inferiority in either; it is not to declare one a slave and the other a freeman that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.<sup>104</sup>

In the decade following the end of the Civil War, the Union ratified the Reconstruction Amendments and passed the first of five civil rights bills.<sup>105</sup> The Fourteenth Amendment and the Civil Rights Act of 1866 called into question the continued legality of anti-miscegenation statutes.<sup>106</sup> The first Section will discuss how anti-miscegenation measures withstood legal challenges to their validity. The Civil War provided plenty of physical specimens to conduct research on racial differences. Agencies of the U.S. government conducted the first wide-scale studies of racial differences that included not just blacks and whites, but also Black Multiracials. As the courts were reaffirming the legal validity of anti-miscegenation measures, racial scientists were publishing the results of this research, which appeared to corroborate long-standing concerns about mixed-race individuals. The second Section will discuss

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104. *Id.* at 213 14.

105. *See supra* note 95.

106. *See infra* Part II.A.

this new “scientific” evidence on racial differences and the dangers of interracial sexual relations. As concerns about miscegenation increased, more and more states moved to redefine their definitions of who was black. Acceptance of the one-drop rule spread towards the end of the Nineteenth Century. This acceptance was codified in statutes starting at the beginning of the Twentieth Century. The third Section will discuss American society’s embrace of the one-drop rule. In the 1920s, the first theoretical studies on the psychological disposition of mixed-race individuals were published. These studies developed the marginal man hypothesis. They concluded that mulattoes were destined to experience social and psychological stress because they existed between social worlds. The best way for them to resolve this stress was to adopt one racial identity, which was normally black. The fourth Section will discuss the marginal man hypothesis.

*A. Challenges to the Validity of Anti-Miscegenation Statutes  
After Abolition*

The passage of the Civil Rights Act of 1866,<sup>107</sup> over the veto of President Andrew Johnson, granted blacks significant legal rights. Among those were the same rights to enter into and enforce contracts as whites.<sup>108</sup> If marriage was a contract, then a legal argument existed that since blacks now had the same right to enter into contracts as whites, state statutes prohibiting interracial marriage would violate federal law. Thus, the Civil Rights Act, along with the ratification of the Fourteenth Amendment, created significant legal questions about the continued validity of anti-miscegenation statutes. In addition, six states, none of which were former slaveholding states, repealed their anti-miscegenation statutes.<sup>109</sup> But, despite the legal questions about anti-miscegenation statutes, most state Supreme Courts upheld these statutes against legal challenges.<sup>110</sup> Alabama was a notable exception, but only for a short period of time.

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107. 14 Stat. 27 (1866). The most important provisions of the Civil Rights Act of 1866 were those that declared blacks citizens and granted equal rights to enter into contracts; to buy, sell, lease or rent property; to sue and be sued in court; and to give testimony in court.

108. *Id.*

109. PAUL R. SPICKARD, MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA 374 (1989). These were Maine, Massachusetts, Michigan, New Mexico, Ohio, and Rhode Island. *Id.*

110. *See, e.g.*, *State v. Gibson*, 36 Ind. 389, 405 (1871) (holding that neither the Fourteenth Amendment nor the Civil Rights Act of 1866 abrogated Indiana anti-miscegenation laws); *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858, 869 70 (1878) (upholding a lower court’s decision that the marriage between a black person and a white person conducted in Washington D.C. was void in the state of Virginia).

The Alabama Supreme Court upheld its anti-miscegenation statute in an 1868 opinion in *Ellis v. State*.<sup>111</sup> That decision was handed down in June of 1868, shortly before the 14th Amendment was ratified in late July of 1868. Four years later, relying on the Civil Rights Act of 1866 and the Fourteenth Amendment, in *Burns v. State*,<sup>112</sup> the Alabama Supreme Court reversed its decision in *Ellis* and declared that the state ban on interracial marriage was unlawful.<sup>113</sup> In doing so, the Court addressed the conviction of a justice of the peace who had solemnized the rites of matrimony between a white person and a negro. In overturning the conviction, the Court pointed out that the Civil Rights Act conferred upon “the negro in express terms . . . the right to make and enforce contracts, amongst which is that of marriage with any citizen capable of entering into that relation.”<sup>114</sup> The Court went on to say, “[w]hether congress, at the time it passed the civil rights bill, had authority to do so or not, which is gravely questioned in the Dred Scott case, there can be no doubt that its cardinal principle is now declared by the 14th amendment to the Federal constitution.”<sup>115</sup>

Five years later, the Alabama Supreme Court reversed itself again on the validity of anti-miscegenation measures in *Green v. State*.<sup>116</sup> This time the Court held that Congress did not intend the Civil Rights Act of 1866 to overturn anti-miscegenation laws. It noted that at the time of passage of the Act, statutes against intermarriage existed in several, if not all, of the Northern states.<sup>117</sup> The Court also rejected its earlier decision that marriage was simply a contract between individuals. Instead the Court pointed out, “marriage, being much more than a contract, and depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts impairing the obligation of contracts.”<sup>118</sup> With regard to the arguments that the recent amendments to the Constitution voided statutes that proscribed interracial marriage, the Court concluded that those amendments were “designed to secure to citizens, without distinction of race, rights of a civil or political kind only—not such as are merely social,

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111. 42 Ala. 525, 527 (1868).

112. 48 Ala. 195 (1872).

113. *Id.* at 198–99.

114. *Id.* at 198.

115. *Id.* Only this Alabama Supreme Court decision and a decision of the California Supreme Court in 1948 struck down anti-miscegenation statutes. Zabel, *supra* note 76, at 78.

116. 58 Ala. 190 (1877).

117. *Id.* at 192–93.

118. *Id.* at 193 (quoting *Maguire v. Maguire*, 37 Ky. (7 Dana) 181, 184 (1838)).

much less those of a purely domestic nature. The regulation of these belongs to the States.”<sup>119</sup>

The Supreme Court never addressed a challenge to a statute that prohibited interracial marriage. In an 1883 opinion in *Pace v. Alabama*,<sup>120</sup> however, the Court upheld another Alabama law that made interracial adultery or fornication a much more serious crime than intraracial adultery or fornication.<sup>121</sup> When this statute came in front of the Alabama Supreme Court in 1881, the Court concluded that it did not violate either the Fourteenth Amendment or the Civil Rights Act.<sup>122</sup> The Court held:

The fact that a different punishment is affixed to the offense of adultery when committed between a negro and a white person, and when committed between two white persons or two negroes, does not constitute a discrimination against or in favor of either race. The discrimination is not directed against the person of any particular color or race, but against *the offense*, the nature of which is *determined by the opposite color of the cohabiting parties*. The punishment of each offending party, white and black, is precisely the same.<sup>123</sup>

The Alabama Supreme Court went on to note that miscegenation was a danger that the state could prevent.<sup>124</sup> The amalgamation of the races could produce “a mongrel population and a degraded civilization.”<sup>125</sup> Thus, preventing its occurrence is sound public policy affecting the highest interests of society and government.<sup>126</sup>

Two years later, the United States Supreme Court adopted the logic of the Alabama Supreme Court and upheld the convictions.<sup>127</sup> In affirming the decision of the Alabama Supreme Court, the Supreme Court removed all doubts about the constitutionality of anti-miscegenation statutes.<sup>128</sup> Penalties against miscegenation became common in the United States. At least thirty-eight states at one point enacted anti-

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119. *Id.* at 196.

120. 106 U.S. 583 (1883).

121. *Id.* at 585.

122. *Pace & Cox v. State*, 69 Ala. 231, 232 (1881).

123. *Id.* (emphasis added).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Pace v. Alabama*, 106 U.S. 583, 585 (1883).

128. *Id.*

miscegenation statutes.<sup>129</sup> Some states extended the prohibition against interracial marriage to cover whites who intermarried with Native Americans, Asiatic Indians, Chinese, Hindus, Japanese, Koreans, Malaysians, and Mongolians.<sup>130</sup> All of the anti-miscegenation statutes, however, proscribed black/white sexual relations.<sup>131</sup>

*B. Scientific Evidence of the Biological Problems Created by the  
Production of Mixed-Raced People*

As Peggy Pascoe noted, miscegenation laws were “the foundation for the larger racial projects of white supremacy and white purity” after Reconstruction.<sup>132</sup> The strongest justification for racial segregation was the fear of the consequences of miscegenation.<sup>133</sup> So as the courts were grappling with the continued legal validity of anti-miscegenation statutes, racial scientists were publishing results of the first massive studies of racial differences that included mixed-race individuals. The carnage of the Civil War had provided plenty of physical specimens to conduct research on racial differences. Agencies of the U.S. government pioneered wide-scale measurements of soldiers based on race during the war years. In short, the autopsies and anthropological studies conducted during the Civil War by surgeons and physicians generally helped to crystalize and substantiate earlier concerns about miscegenation.<sup>134</sup> These studies “proved” that Black Multiracials may be more intelligent than the full-blooded black.<sup>135</sup> However, because of their physical infirmities and lack of morals, all things considered, Black Multiracials were inferior to full-blooded blacks.<sup>136</sup>

President Lincoln created the U.S. Sanitary Commission in order to study the physical and moral conditions of federal troops so that army life could be improved.<sup>137</sup> One of the most important studies of racial differences produced by the Commission was published by Dr. Sanford Hunt in 1869 in the prestigious London *Anthropological Review*

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129. RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 17 (2001).

130. *Id.*

131. *Id.*

132. PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* 6 (2009).

133. Zabel, *supra* note 76, at 75.

134. JOHN G. MENCKE, *MULATTOES AND RACE MIXTURE* 39 (2d ed. 1979).

135. *Id.* at 38–39.

136. *Id.* at 39.

137. U.S. SANITARY COMM’N, *THE SANITARY COMMISSION OF THE UNITED STATES ARMY: A SUCCINCT NARRATIVE OF ITS WORKS AND PURPOSES* 5–6 (1864).

as an article entitled *The Negro as Soldier*.<sup>138</sup> At the time of the publication of Dr. Hunt's article, there were three different methods employed to determine the mental capacities of the races.<sup>139</sup> One was by external measurements of the cranium.<sup>140</sup> This was the easiest method to employ because it simply required measuring the head size of living or deceased individuals. The downside of this measurement was that it could not account for the thickness of the skull. The second method was to measure the internal space of the skull.<sup>141</sup> As those engaging in scientific investigations became more professionalized, however, the researchers who had been studying the shapes and sizes of the skulls started to focus more attention on the weight of the brain.<sup>142</sup> After all, the other two methods implicitly assumed that intelligence correlated with brain size. Thus, the weight of the brain was a direct, better, and more accurate measure of innate intellectual ability than the size of the cranium or the interior volume of the skull.

Hunt published the results of a report on the weight of the brains of 405 autopsies of soldiers, 381 colored and 24 white.<sup>143</sup> Nearly all subsequent racial studies of the latter part of the Nineteenth Century referred to the conclusions in his article.<sup>144</sup> Hunt found that whites had larger brains than blacks.<sup>145</sup> While this finding was not surprising, Hunt

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138. Sanford B. Hunt, *The Negro as a Soldier*, 7 ANTHROPOLOGICAL REV. 40 (1869).

139. *Id.* at 49-50.

140. *Id.*

141. *Id.* at 50.

142. *Id.*

143. It may seem that autopsies of 405 soldiers is a small sample to establish the notion that the brains of blacks are smaller than those of whites and that brains of mixed-race blacks with less than fifty percent white blood are smaller than those of blacks. Keep in mind, however, that the doll study conducted by Kenneth and Mamie Clark in Arkansas and Massachusetts to establish the psychological damage that segregation caused in blacks sampled only 253 children. WILLIAM E. CROSS, *SHADES OF BLACK: DIVERSITY IN AFRICAN-AMERICAN IDENTITY* 23, 26 (1991). The research by the psychologists purporting to show that African-Americans in public schools had lower self-esteem has been the subject of criticism. See, e.g., *id.* at 29, 31, 33, 35 (arguing that the psychologists, based on "the troubled personalities they saw in their clinical practice," confused "the actuality of race as a debilitating factor in the lives of a fraction . . . with the *potentiality* of race damaging the lives of the majority" and that they, drawing on theories of Jewish self-hatred, disregarded their own empirical findings to the contrary as statistical "noise").

144. See JOHN S. HALLER, JR., *OUTCASTS FROM EVOLUTION* 34 (1971) (noting that anthropometric studies such as those published by Hunt "were used in the late nineteenth century to support institutional racism").

145. Hunt, *supra* note 138, at 51.



went further. He also classified the brains that he weighed according to the fraction of white blood of the deceased. Hunt's results included the weights of the brains not only for full-blooded whites and blacks, but also for those with a mixture that included three-fourths (quadroon), one-half, one-quarter, one-eighth, and one-sixteenth white blood.<sup>146</sup> According to his results, the average weight of the brain of the white soldier was more than five ounces heavier than that of the average black and three ounces heavier than that of the quadroon.<sup>147</sup> The brains of those with fifty percent black and fifty percent white blood were, on average, slightly heavier than that of the full-blooded black.<sup>148</sup> Hunt found, however, that the average weight of the brains of those with only one-quarter, one-eighth, or one-sixteenth white blood were smaller than the average of the full-blooded blacks.<sup>149</sup> From this data, Hunt concluded that "[t]he percentage of exceptionally small brains [was] largest among negroes having but a small proportion of white blood."<sup>150</sup> Moreover, "[s]light intermixtures of white blood diminish the negro brain from its normal standard; but, when the infusion of white blood amounts to one-half (mulatto), it determines a positive increase in the negro brain, which in the quadroon is only three ounces below the white standard."<sup>151</sup> Thus, his studies seem to justify the commonly held beliefs that miscegenation not only has detrimental effects on mental abilities, but those negative effects become more acute with successive generations.

Other studies conducted on Union soldiers showed that there were several physical differences between black, white, and mixed-race soldiers. These studies generally noted that while the lung capacity of the black soldier was less than that of the white, it was greater than that of the Black Multiracial.<sup>152</sup> The same held true for measurements of head size and height.<sup>153</sup> The general conclusions were that mulattoes were physically inferior to both blacks and whites.<sup>154</sup>

As American society moved towards the closing decades of the Nineteenth Century, dominant scientific opinion accepted the notion

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146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 52.

151. *Id.* (emphasis omitted).

152. Benjamin Apthorp Gould, U.S. Sanitary Comm'n, *Investigations in the Military and Anthropological Statistics of American Soldiers* 471 (1869).

153. *Id.* at 104-05, 147 (height), 381 (head size).

154. See HALLER, *supra* note 144, at 64-65 (summarizing the view of Frederick L. Hoffman to that effect).

that the Black Multiracial was possibly more physically attractive and often more intelligent than the full-blooded black, but Black Multiracials were “constitutionally weak, prone to debilitating diseases, and . . . basically infertile.”<sup>155</sup> In addition, some scientists added a Darwinist Neo-Lamarckian argument to the concerns about the negative consequence of miscegenation. In the early 1800s, Jean Baptiste Lamarck proposed a theory that there was an unconscious striving of organisms to improve their species.<sup>156</sup> In practice, this generally meant that the male of a species was instinctively driven to mate with the best female possible.<sup>157</sup> This explained why the males of some species waged war with each other. The winner would get the females of his first choice. In the post-Darwinian age of the late Nineteenth Century, Neo-Lamarckian biologists combined this insight with their perception of black males. Thus, they argued that black males would instinctually be attracted to white women because they were superior to black women.<sup>158</sup> But, as contradictory as it sounds, these scientists argued that this natural urge produced unnatural consequences. Rather than improving the species, over the long haul it would make it worse.<sup>159</sup> As a result, society had a vested interest in controlling this instinctive drive. Lynching became one of the primary means to deal with this instinctual drive. The peak years of lynchings were from 1882 until 1927 when over 3,500 blacks were killed.<sup>160</sup> While no doubt many of the lynchings of black men were motivated by other reasons, the most common justifications given was the uncontrollable sexual drive in black men that led them to rape white women.<sup>161</sup>

*C. Ascendancy of the One-Drop Rule Was Partially Due to Concerns  
About Miscegenation*

During the antebellum period, most states tied some legal rights to race. This necessitated a requirement that states adopt a means to determine a person’s race. By the start of the Nineteenth Century the states had developed three different legal methods to determine a

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155. MENCKE, *supra* note 134, at 38.

156. Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 655 (1985).

157. *Id.*

158. *Id.* at 656.

159. *See supra* notes 132–136 and accompanying text.

160. JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* 60 (2000).

161. MARTHA ELIZABETH HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE 19TH-CENTURY SOUTH* 176 (1997).

person's race—blood fractions, appearance, and personal associations.<sup>162</sup> States enacted a variety of blood fraction statutes to specify the quantum of blood that separated whites from blacks/mulattoes. The most common blood fraction for determining if a person was white was one-eighth Negro blood.<sup>163</sup>

Fueled by concerns about the horror of miscegenation, the one-drop rule had become the unwritten law for determining race in the decades following emancipation.<sup>164</sup> In discussing its widespread acceptance, Booker T. Washington stated in 1900:

It is a fact that, if a person is known to have one per cent of African blood in his veins, he ceases to be a white man. The ninety-nine per cent of Caucasian blood does not weigh by the side of one per cent of African blood. The white blood counts for nothing. The person is a Negro every time.<sup>165</sup>

Soon after the turn of the century, state legislatures began to enact statutes that made the one-drop rule the legal norm for determining a person's race. Tennessee was the first to do so in 1910, followed by Louisiana later that year, Texas and Arkansas a year later, then Mississippi (1917), North Carolina (1923), Virginia (1924), Alabama and Georgia (1927), and Oklahoma (1931).<sup>166</sup> In addition, eight other states—Florida, Indiana, Kentucky, Maryland, Missouri, Nebraska, North Dakota, and Utah—amended their blood fraction statutes to classify a person as black who had as little as one-sixteenth or one-thirty-second of black blood.<sup>167</sup> The Census Bureau formally adopted the one-drop rule as the way to determine a person's race for the 1930 Census when it abandoned the inclusion of any mulatto category.<sup>168</sup> The instructions for that census form stated that, "A person of mixed white and Negro blood should be returned as a Negro, no matter how small the percentage of Negro blood."<sup>169</sup>

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162. SWEET, *supra* note 74, at 169.

163. Zabel, *supra* note 76, at 77.

164. MENCKE, *supra* note 134, at 37.

165. *Id.* (quoting BOOKER T. WASHINGTON, *THE FUTURE OF THE AMERICAN NEGRO* 158 (1902)).

166. SWEET, *supra* note 74, at 318–19.

167. *Id.* at 319.

168. Jennifer Hochschild & Vesla Weaver, *Politics of Racial Qualification and the Politics of Racial Inequality*, in *REMAKING AMERICA: DEMOCRACY AND PUBLIC POLICY IN THE AGE OF INEQUALITY* 159, 165 (Joe Soss et al. eds., 2007).

169. NOBLES, *supra* note 93, at 72.

*D. The Marginal Man Hypothesis: Mixed-Race Blacks Encouraged to Identify with Only Their African Ancestry*

The earliest psychological studies of the development of mixed-race individuals were conducted in the 1920s and 1930s by Robert Park and his student, Everett Stonequist.<sup>170</sup> Before World War I, racial scientists generally assumed that race and culture were fused together. Thus, cultural traits were a product of biological racial traits and tendencies. Park and Stonequist, however, attributed the differences between mulattoes and blacks to social and cultural conditions, as opposed to biology.<sup>171</sup> Park developed what he called the “marginal man” hypothesis.<sup>172</sup> He concluded that mulattoes were destined to experience social and psychological stress because they existed between social worlds.<sup>173</sup> The deep-seated anxiety that results from their racial marginality “initiates a process of disorganization which finds expression in statistics of delinquency, crime, suicide and mental instability.”<sup>174</sup> Yet this did not necessarily mean that they were not intelligent. These scholars asserted that mulattoes were likely more intelligent than blacks because the crises of marginality made them more self-conscious and reflective.<sup>175</sup> The dual biological and cultural situation they inhabited generated a situation in which they continually encountered conflicting feelings of pride and shame, love and hate. This conflict was the central feature of the organization of their life. The heightened sensitivity caused by this conflict, however, led to increased self-consciousness and race consciousness. Mixed-race blacks were, therefore, more driven to resolve this problem and, thus, more likely to become leaders of the Black Community. As Park argued, “Twenty per cent of mixed bloods among the American Negroes have produced 85 per cent of the race’s superior men.”<sup>176</sup> Park and Stonequist also felt

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170. See Chad Alan Goldberg, *Robert Park’s Marginal Man: The Career of a Concept in American Sociology*, 4 LABORATORIUM 199, 199, 201 02 (2012) (discussing the roots of Park’s and Stonequist’s concept of the “marginal man” in German sociology’s concept of the “stranger” exemplified by the Jews in Europe and W.E.B. Du Bois’s concept of “double-consciousness”).

171. Robert E. Park, *Human Migration and the Marginal Man*, 33 AM. J. SOC. 881, 893 (1928); Everett V. Stonequist, *The Problem of the Marginal Man*, 41 AM. J. SOC. 1, 7 (1935).

172. Park, *supra* note 171, at 881.

173. *Id.* at 893.

174. Stonequist, *supra* note 171, at 12.

175. Robert E. Park, *Mentality of Racial Hybrids*, 36 AM. J. SOC. 534, 545 (1931).

176. *Id.* at 544.

that mulattoes would benefit from greater contact with the dominant culture and lower likelihood of experiencing color prejudice.<sup>177</sup>

Stonequist asserted that multiracial identity would always be problematic because of the societal issues regarding race. These problems would include inferiority complexes, exaggerated self-consciousness, restlessness, and discontent.<sup>178</sup> For multiracial individuals to achieve a healthy psychological identity that embraced both races was impossible.<sup>179</sup> Stonequist noted that one of these social worlds was always dominant, so the mixed-race person identified with one social world or racial heritage to the nearly total exclusion of the other.<sup>180</sup> Given the physical appearance of most mixed-race people and the dominance of the one-drop rule, this meant that mixed-race people should identify with their black ancestry.

### III. CHANGES IN ATTITUDES AND ACCEPTANCE OF INTERRACIAL SEXUAL RELATIONS SINCE THE COMMENCEMENT OF SCHOOL DESEGREGATION

The strong objections to interracial sexual relations continued up to the start of school desegregation. Serious legal impediments existed, with about thirty states still banning interracial marriage as late as the early 1950s.<sup>181</sup> Fostered by historical objections to interracial marriage, religious objections, and biological and psychological concerns, these legal prohibitions had widespread public support. For example, in 1958, only four percent of whites approved of interracial marriage between

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177. See, e.g., *id.* at 544 45 (arguing that mulattoes are “disposed to identify themselves” with the whites, while they are also “keenly aware of the defects of the Negro” which “they are not able to view . . . with the same objectivity and tolerance as the white man does,” which is one reason why the mulatto “lives at a higher tension than the Negro”); EVERETT V. STONEQUIST, *THE MARGINAL MAN: A STUDY IN PERSONALITY AND CULTURE CONFLICT* 111 12 (1937) [hereinafter *THE MARGINAL MAN*] (arguing that, since “the mulatto is closer to the white man in cultural attainments and physical traits,” it is very difficult to accept “this extreme color line,” causing “bitter frustration and mental conflict”).

178. Cf. Christine C. Iijima Hall, *Please Choose One: Ethnic Identity Choices for Biracial Individuals*, in *RACIALLY MIXED PEOPLE IN AMERICA* 250, 250 51 (Maria P. P. Root ed., 1992) (discussing the internal conflicts that Stonequist argued multiracial identity necessarily entailed).

179. Cf. *THE MARGINAL MAN*, *supra* note 177, at 8 (referring to the marginal man as “poised in psychological uncertainty”).

180. *Id.* at 8.

181. *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967) (noting that, in 1967, sixteen states still banned interracial marriage and fourteen had repealed their statutes over the past fifteen years).

blacks and whites.<sup>182</sup> As a result, interracial marriages between blacks and whites were very rare. “Of the almost twelve million blacks over the age of fifteen in the country, only 51,000 were married to whites.”<sup>183</sup> Black women were slightly more likely to have a white spouse than black men.<sup>184</sup> Surveys in the 1960s showed only slight improvement in the acceptance of interracial sexual relations by American society. About ninety-two percent of whites stated they would not consider marrying an African American, and as late as 1965 forty-eight percent of whites in a national poll expressed approval of anti-miscegenation laws.<sup>185</sup> In the South, where sixty percent of blacks lived,<sup>186</sup> the feeling was even stronger with seventy-two percent of whites and thirty percent of blacks favorably embracing such laws.<sup>187</sup>

Even though the Supreme Court had shown its boldness in striking down segregation statutes, it was more restrained when it came to striking down anti-miscegenation measures. A few months after the *Brown v. Board of Education* decision, the Court declined to hear the case of a black woman convicted of violating the Alabama anti-miscegenation statute.<sup>188</sup> Two years later, the Court again denied certiorari on a similar case from Virginia.<sup>189</sup> The Virginia Supreme Court of Appeals affirmed the lower court’s rejection of a challenge to the Racial Integrity Act.<sup>190</sup> The Act outlawed marriages by whites with anyone who had a single drop of non-white blood.<sup>191</sup> Virginia law not only criminalized interracial marriage within the state, but also criminalized entering into such a marriage outside of the state with the intent of evading the

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182. See WILLIAMS, *supra* note 42, at 89.

183. Kevin Brown & Tom I. Romero, II, *The Social Reconstruction of Race & Ethnicity of the Nation’s Law Students: A Request to the ABA, AALS, and LSAC for Changes in Reporting Requirements*, 2011 MICH. ST. L. REV. 1133, 1172 (citation omitted).

184. *Id.* at 1173.

185. ROBERT J. SICKELS, RACE, MARRIAGE AND THE LAW 117, 121 (1972).

186. BUREAU OF THE CENSUS, *supra* note 97, at 13.

187. SICKELS, *supra* note 185, at 117, 121; cf. Maria Root, *The Color of Love*, Am. Prospect (Mar. 25, 2002), <http://prospect.org/article/color-love> [<https://perma.cc/4HT6-MC6L>].

188. Zabel, *supra* note 76, at 75–76.

189. *Id.*

190. *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955), *vacated*, 350 U.S. 891, *aff’d.*, 90 S.E.2d 849, *appeal dismissed*, 350 U.S. 985 (noting that a white woman sought and received an annulment of her marriage to a Chinese man because it violated the Racial Integrity Act).

191. An Act to Preserve Racial Integrity, ch. 371, sec. 5, 1924 Va. Acts. 534, 535.

statute's proscription.<sup>192</sup> The Virginia Court unanimously stated that the purposes of the statute were the prevention of the corruption of blood, the production of a mongrel breed of citizens, the obliteration of racial pride, and the preservation of the racial integrity of its citizens.<sup>193</sup>

The Supreme Court finally struck the death knell for anti-miscegenation marriage statutes with its 1967 decision in *Loving v. Virginia*.<sup>194</sup> This was the same year that the District Court in Alabama issued its desegregation decision in *Lee v. Macon County*. In his unanimous opinion for the Court, Chief Justice Earl Warren noted that Virginia only prohibited interracial marriages involving white persons.<sup>195</sup> This demonstrated that the racial classifications standing on their own justifications were measures designed to maintain white supremacy.<sup>196</sup>

*A. Increasing Interracial Relationships and the Multiracial Movement*

As school desegregation became more and more of an accepted fact of American life, the rates of interracial marriage began to rise. The percentage of blacks with a spouse of another race, increased from 1.1% in 1970, to 2.4% in 1980, to 4.1% in 1990.<sup>197</sup> Increases in interracial marriage and cohabitation also led to an increase in the numbers of Black Multiracials. This also spawned another unexpected movement, the Multiracial Movement that commenced in the late 1980s.<sup>198</sup>

Up until 1950, the Census Bureau would send enumerators to residences of Americans in order to fill out the census forms. The enumerators would be responsible for answering the questions on census forms, including those about the race/ethnicity of those in a household. However, commentators questioned the 1950s census counts. The highly re-

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192. 45 Va. Code Ann. § 5089 (1942).

193. See *Naim*, 87 S.E.2d at 756 (“We find there no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship.”).

194. 388 U.S. 1 (1967). In 1924, Virginia adopted the Racial Integrity Act, which defined a person as white if they had “no trace whatsoever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian . . . shall be deemed to be white persons.” Sec. 5, 1924 Va. Acts. at 535. A 1930 statute also defined as colored, anyone “in whom there is ascertainable any Negro blood.” An Act to Amend and Re-Enact Section 67 of the Code of Virginia Defining Colored Persons and American Indians and Tribal Indians, ch. 85, § 67, 1930 Va. Acts 96, 97.

195. *Loving*, 388 U.S. at 11 n.11.

196. *Id.* at 11.

197. BROWN, *supra* note 47, at 149.

198. See *infra* text accompanying notes 204–217.

garded demographer Ansley Coale concluded that there was an undercount of nonwhites by twelve to thirteen percent.<sup>199</sup> The problem of undercounting blacks was traced to mistakes by census enumerators that had been charged with determining a person's race based on their physical appearance. To remedy this problem for the 1960 census, the Bureau decided to send census forms to homes and have the heads of the household fill them out before the enumerator arrived. Eighty percent of American households received an advanced copy of the form.<sup>200</sup> If needed, the enumerators would correct forms improperly completed.<sup>201</sup>

The form used for the 1970 census was the first one designed to be completed by the respondents and sent back to the Census Bureau.<sup>202</sup> While this change might have seemed purely administrative at the time, the requirement that heads of households fill out the forms on their own fundamentally redefined the question of racial identification. This switch implied that racial identification was not necessarily determined by social ascription. Rather, it was a matter of self-identification because it raised the issue of how a person identified his or her own race and that of their dependents. Many mixed-race individuals (or their parents or guardians on their behalf) began to object to forms that required them to identify with only one racial/ethnic category.<sup>203</sup>

By the late 1980s, individuals in black-white marriages<sup>204</sup> and multiracial groups spearheaded efforts to add a "multiracial" option to all local, state, and federal forms. In 1988, more than thirty multiracial organizations came together to create the first nationwide multiracial

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199. MARGO J. ANDERSON & STEPHEN E. FIENBERG, WHO COUNTS: THE POLITICS OF CENSUS-TAKING IN CONTEMPORARY AMERICA 30 (1999).

200. Snipp, *supra* note 92, at 569.

201. *Id.*

202. U.S. Dep't of Commerce, Bureau of the Census, 1970 Census of Population and Housing: Data-Collection Forms and Procedures 3 (1971).

203. See Katherine K. Wallman, Suzann Evinger & Susan Schechter, *Measuring Our Nation's Diversity: Developing a Common Language for Data on Race/Ethnicity*, 90 AM. J. PUB. HEALTH 1704, 1704 (2000).

204. As Kim Williams, who extensively studied the movement to alter the federal forms to allow individuals to mark one or more boxes, stated, "Unexpectedly, I found that white, liberal, and suburban-based middle-class women (married to black men) held the leadership roles in most multiracial organizations. These white women helped to set an optimistic tone for multiracial activism; many believed that American racial polarization could be overcome by their example. Most of these women were looking for community—not for a census designation. Movement spokespeople reversed these priorities somewhat, although they parted ways after the OMB decision in 1997." WILLIAMS, *supra* note 42, at 112.



advocacy group, the Association of MultiEthnic Americans (AMEA).<sup>205</sup> The AMEA sought respect and recognition for multiracial/multiethnic individuals and advocated for the addition of a multiracial category on all government forms.<sup>206</sup> In its first year, the AMEA actually sought to convince the federal government to add a new category, “Other,” to the racial and ethnic categories required by federal agencies.<sup>207</sup> The Office of Management and Budget (OMB) decided not to take any action and concluded that it needed to conduct or authorize more testing before it could institute such a change.<sup>208</sup> However, even though the instructions for the 1990 census form stated that individuals should check the one box that best described their race, more than five hundred thousand people refused to abide by these instructions and selected more than one racial category.<sup>209</sup>

AMEA and other multiracial groups continued to advocate for changes in state and federal regulations regarding the collecting and reporting of racial and ethnic data. From 1993 to 1997, the federal government conducted a review of its existing regulations on collecting and reporting racial and ethnic data.<sup>210</sup> Multiracial advocates argued that a multiracial designation was more accurate because it better reflected the reality of mixed-race individuals who tended to view themselves as multiracial rather than belonging to a single racial or ethnic group. In addition, these groups rejected the Marginal Man Hypothesis and instead argued against compelling multiracial individuals to identify with one parent more than the other.<sup>211</sup> They also noted the

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205. See generally *AMEA’s History*, AMEA, <https://web.archive.org/web/20060816031759/http://www.ameasite.org/history.asp> [https://perma.cc/J3PF-7U4H] (last visited Mar. 13, 2017) (providing a timeline of the AMEA’s history). The American MultiEthnic Association was the product of an effort to provide a multiracial option on official forms including Census forms. For a comprehensive history of the movement, see Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 Nw. U. L. REV. 1701, 1749–52 (2003).

206. Mezey, *supra* note 205, at 1749.

207. RAINER SPENCER, SPURIOUS ISSUES: RACE AND MULTIRACIAL IDENTITY POLITICS IN THE UNITED STATES 126 (1999).

208. *Id.* at 71–72; see also Bijan Gilanshah, *Multiracial Minorities: Erasing the Color Line*, 12 L. & INEQ. 183, 188 (1993) (noting that around this time there were nearly a million interracial couples in the United States, more than triple the amount recorded in the 1970 census).

209. Wendy D. Roth, *The End of the One-Drop Rule? Labeling of Multiracial Children in Black Intermarriages*, 20 SOC. F. 35, 38 (2005).

210. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (Oct. 30, 1997).

211. Mezey, *supra* note 205, at 1751.

inherent racism of the one-drop rule,<sup>212</sup> a rule that is not used for any other racial or ethnic group and appears only to exist in the United States.<sup>213</sup>

The intense debates conducted during the review process culminated with OMB publishing revisions to prior regulations on October 30, 1997 (hereinafter, the 1997 Revisions).<sup>214</sup> The 1997 Revisions, which were in effect for the 2000 census, included several significant changes to how racial and ethnic data was collected and reported to the federal government.<sup>215</sup> Among these significant changes were those that not only declared self-identification was the preferred way to obtain this information, but allowed individuals to designate all of their racial categories.<sup>216</sup> Thus, the 2000 Census was the first one in American history where individuals could indicate multiple racial and ethnic identities.<sup>217</sup>

From information gathered by the 2000 Census, it is obvious that the percentage of blacks engaged in interracial marriages continued to increase, with seven percent of single-race blacks marrying outside of their race.<sup>218</sup> Black interracial marriage rates remain on the rise. According to a 2012 Pew Research Center Report, about seventeen percent of newlywed blacks married outside of their race.<sup>219</sup> This percentage continued to be significantly higher for black males than for black females, 23.6% compared to 9.6%.<sup>220</sup> Interracial marriage rates involving blacks continues to climb. A Pew Research Center Report three

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212. For a discussion of the past and present implications of the one-drop rule, see KERRY ANN ROCKQUEMORE & DAVID BRUNSMA, *BEYOND BLACK: BIRACIAL IDENTITY IN AMERICA* 1 17 (2002).

213. See DAVIS, *supra* note 69, at 13.

214. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782.

215. *Id.* at 58,785 87.

216. *Id.* at 58,785.

217. ROCKQUEMORE & BRUNSMA, *supra* note 212, at 1 2; see also WILLIAMS, *supra* note 42, at 2 (quoting the former head of the Census Bureau as saying “Census 2000 will go down in history as the event that began to redefine race in American society”).

218. Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Intermarriages*, 60 POPULATION BULL. no. 2, 2005, at 12 tbl.2.

219. See PAUL TAYLOR ET AL., PEW RES. CTR., *THE RISE OF INTERMARRIAGE: RATES, CHARACTERISTICS VARY BY RACE AND GENDER* 11 (2012) (noting that from 2008 to 2010 the share of blacks intermarrying increased from 15.5% to 17.1%).

220. *Id.* at 1, 9. For black men, these represent substantial increases from the 15.7% figure in 2000 and 7.9% in 1980. While it also increased for black women, the increase went from 7.1% in 2000 and 3.0% in 1980. See PAUL

years later revealed that nineteen percent of blacks who married in 2013 married a person of a different race, including one in four black men.<sup>221</sup>

Because of the changes in how the federal government collects and reports racial and ethnic information contained in the 1997 Revisions, it is possible to determine what percentage of those with some African ancestry self-identify as Black Multiracials. According to the 2010 census, 7.4% of blacks<sup>222</sup> (up from 4.8% in 2000)<sup>223</sup> indicated another racial category, over two and a half times the 2.9% of the American population as a whole.<sup>224</sup> As one might expect, the younger blacks are, the more likely they are to be multiracial. Census figures from 2012 show that the portion of mixed-race blacks between the ages of twenty and twenty-four was only 7.9%.<sup>225</sup> However, the portion of mixed-race blacks among blacks between the ages of fifteen and nineteen was 8.9%, between ten and fourteen years it increased to 10.9%, between five and nine years to 15%, and for those under the age of five it was 19.1%.<sup>226</sup>

### CONCLUSION

There is more than one way to discuss the long-term impact that attorneys who advocated for school desegregation like Attorney Fred Gray had on American society. While one could limit such an analysis to the rise and fall of school desegregation, such a narrow perspective would fail to appreciate the broader implications of their careers. From a scientific point of view, what justified segregation was the fear of the negative consequences of interracial sexual relations. For as the Alabama Supreme Court said in its 1881 opinion upholding a statute

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TAYLOR ET AL., PEW RES. CTR., MARRYING OUT: ONE-IN-SEVEN NEW U.S. MARRIAGES IS INTERRACIAL OR INTERETHNIC 22 (2010). With respect to blacks having a white spouse, more recent statistics show a similar trend. In 2010, 8.5% of married black men had white spouses, an increase from 6.6% in 2005. *America's Families and Living Arrangements: 2010*, U.S. CENSUS BUREAU, <https://www.census.gov/population/www/socdemo/hh-fam/cps2010.html> [<https://perma.cc/LYS3-26RW>] (last visited Mar. 14, 2017). At the same time, only 3.9% of black women were married to white men, an increase from 2.8% in 2005. *Id.*

221. Wang, *supra* note 46.

222. KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 7 tbl.3 (2011).

223. See *United States Multiracial Profile*, CENSUS SCOPE, [http://www.census.gov/scope/us/print\\_chart\\_multi.html](http://www.census.gov/scope/us/print_chart_multi.html) [<https://perma.cc/82KD-9YF3>] (last visited Mar. 15, 2017) (showing the multiracial profile of the 2000 census).

224. HUMES ET AL., *supra* note 222, at 8 fig.2.

225. BROWN, *supra* note 47, at 150.

226. *Id.*

that punished interracial fornication more severely than intra-racial fornication:

The evil tendency of the crime of living in adultery or fornication is greater when it is committed between persons of the two races, than between persons of the same race. Its result may be the amalgamation of the two races, producing a mongrel population and a degraded civilization, the prevention of which is dictated by a sound public policy affecting the highest interests of society and government.<sup>227</sup>

Advocates for school desegregation like Attorney Fred Gray never put forth increases in interracial sexual relations between blacks and whites as part of the justifications for school desegregation. Nevertheless, such was a natural result of bringing black and white children together in the same school. The point was for them to learn to see each other as individuals as opposed to simply member of different racial groups. Such a change in perception about those of different races will certainly lead some to have very close personal relationships.

At this point, just fifty years removed from the decision in *Lee v. Macon County*, while school desegregation may have run its course, the effects of it have not. We do not really know at this moment how these increases in interracial marriage will ultimately play out in American society. We have not yet obtained the racial utopia that so many have worked so hard, shed so many tears, and spilled so much blood to bring about. However, for those of us with the capability of taking the long view and looking at this issue from the vantage point that existed in 1967, it is amazing to see so much fundamental change in a half a century, especially with regard to interracial sexual relations. We no longer believe the God-decreed objections or the scientific rationales that justified the prohibitions upon it. And such a fundamental change is well worth celebrating. So, Attorney Fred Gray, thank you. You left the world better than you found it. Job well done.

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227. *Pace & Cox v. State*, 69 Ala. 231, 232 (1881).

